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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

APRIL TERM, 1966

NO. 1229

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FILED
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JOHN F. DAVIS, CLERK

COMMONWEALTH OF PENNSYLVANIA

v.

JAMES R. McCARTHY,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

(First Case)

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COMMONWEALTH OF PENNSYLVANIA

v.

JAMES R. McCARTHY,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

(Second Case)

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania refusing to allow an appeal from the judgment and sentence of the Court of Quarter Sessions of Allegheny County, Pennsylvania in that your Petitioner was denied due process of law.

OPINION BELOW

The Superior Court of Pennsylvania affirmed the judgment of the trial court without opinion. The Supreme Court of Pennsylvania filed no Opinion but merely refused to hear the appeal of your petitioner.

Constitutional Rules Involved.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257 (3) and Rule 22 (1) of this Court. The Supreme Court of Pennsylvania entered judgment affirming the lower court. On February 10, 1966, the Supreme Court of Pennsylvania refused a Petition for Reconsideration filed by your petitioner.

QUESTION PRESENTED

Must a Court en banc hearing post-trial motions after conviction be composed of at least one local judge?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED.

1. United States Constitution, Amendment Fourteen: * * * that "nor shall any state deprive any person of life, liberty or property without due process of law."

2. 28 U.S. C. Sect. 1257 (3) provides: "1257 (3) State Courts, Appeal, Certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3.) By Writ of Certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States". June 25, 1948, C-646, 62 Stat. 929.

STATEMENT OF THE CASE

The petitioner was prosecuted for the crime of cheating by fraudulent pretenses under the Act of June 24, 1939, P.L. 872 Sect. 836, 18 Purdon's (Pa.) Statute, Section 4836. Two indictments were tried before the Honorable Alton A. McDonald of the 47th Judicial District Specially Presiding and a jury in the Court of Quarter Sessions of Allegheny County, Pennsylvania at Nos. 672 and 673 September Sessions 1963. The Jury returned a verdict of Guilty as to both indictments on April 15, 1964. After the verdict, the petitioner moved for a new trial and in arrest of judgment.

Before the said motions were heard, the petitioner was again brought to trial before the Court of Quarter Sessions of Allegheny County, Pennsylvania at Nos. 513 to 531 April Sessions, 1963 the Honorable Lloyd F. Weaver, of the 18th Judicial District. Specially Presiding, and a Jury. The petitioner was charged with nine counts of false pretense under the statute cited above, with nine counts of fraudulent conversion under the Act of June 24, 1939, P.L. 872, Sect. 836, 18 Purdon's (Pa). Statutes. Sect. 4834, and one count of conspiracy to cheat and defraud under the same Act, 18 Purdon's (Pa.) Statutes, Sect. 4302. The trial court sustained demurrers to two counts of false pretense and to two counts of fraudulent conversion. The jury found the petitioner and a co-defendant not guilty of conspiracy. The jury found the petitioner guilty on all other counts.

Motions for a new trial and in arrest of judgment were filed after the Second trial.

On October 16, 1964, a Court in banc composed of the Honorable Lloyd F. Weaver and the Honorable

Alton A. McDonald held a combined hearing to consider the motions for new trial and in arrest of judgment from both trials of the petitioner. Each of the members of the Court in banc was a visiting judge, being from a County other than the one in which the petitioner was tried. Each of the members of the Court in banc also presided at a trial of the petitioner which formed a basis for the post-trial motions to be considered.

The Court in banc on November 20, 1964, denied the motions for new trial and in arrest of judgment in each case.

On January 19, 1965 your petitioner appealed to the Superior Court of Pennsylvania: the first case at No. 126 April Term, 1965 and the second case at No. 127 April Term, 1965. On October 15, 1965 the Superior Court, without opinion, affirmed the judgments and sentences of the Courts below. A Petition for rehearing was filed in the Superior Court which petition was denied on November 9, 1965.

On November 9, 1965 a Petition for Allowance of Appeal was submitted to the Supreme Court of Pennsylvania, Western District, at No. 2697A Miscellaneous Docket 1965. The Supreme Court, on December 20, 1965 denied the Petition for Allowance of Appeal. A Petition for Reconsideration was denied by the Supreme Court on February 10, 1966.

ARGUMENT

There is no statute in Pennsylvania which specifically provides that a Court in banc must hear motions for a new trial and in arrest of judgment after conviction in a criminal case. Nor is there any statute specifically setting down the rules regarding the composition or manner of selection of the members of such a Court. We must, therefore, look to the case law.

Pennsylvania Equity Rule 71 provides as follows:

> "If exceptions are filed they shall be placed upon the Argument List, as upon a rule for a new trial, and heard by the Court in banc, which shall sustain or dismiss them, in whole or in part, and affirm, modify or change the decree nisi accordingly".

In *Com. of Pa. v. Parker et al., Appellants,* 294 Pa. 144 (1928), the Supreme Court of Pennsylvania remarked: "Under Equity Rule 71, all motions for new trials must be heard by the court in banc: (Citing) Carney v. Penn Oil Co., Appellant, 289 Pa. 588, (1927) Stone v. New Shiller B. & L. Assn, et al., appellant, 293 Pa. 161 (1928) and authorities there cited . . . . In civil cases the court hearing motions for a new trial must sit in banc.

There is no statutory requirement nor decision in Pennsylvania that motion for a new trial in a homicide case must be heard in banc, yet this very proper practice prevails in the larger judicial districts of the state and had a request been made and refused that this course be pursued by the court below we might have returned the record to give us the benefit of such a review."